YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**Cause No. P1300CR20081339** **Division 6** **SUPPLEMENTAL BRIEF RE: PRECLUSION & SANCTIONS TAKEN UNDER ADVISEMENT ON APRIL 7, 2010**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits a supplemental brief prior on Defendant's motions for preclusion of evidence, sanctions including dismissal of the death penalty.

MEMORANDUM OF POINTS AND AUTHORITIES

On April 7, 2010, the parties argued several motions to this Court that were filed by the defense, to-wit: Motion to Preclude Late Evidence and Witnesses filed first filed on Feb. 5, 2010 and supplements thereto; Motion to Preclude Late Sorenson Testing filed Feb. 25, 2010; and supplemental briefs requesting the Court to preclude State's evidence consisting of testimony and opinions from experts Greg Cooper, Sy Ray, Erik Gilkerson, specified UBS emails, Girard phone records, identified bank records, DPS forensic reports and crime scene

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

diagrams. In addition, the Court has under advisement Defendant's motion to dismiss the death penalty as a sanction for other allegations the State made late disclosure of evidence.

The thrust of all of the defenses pleadings and oral arguments are the State is guilty of serial late disclosures, failure to disclose shoe print evidence in the possession of law enforcement for a period of three (3) months, all of which has caused irrevocable prejudice to the defendant that has violated his 6th Amendment rights.

A. **SHOE PRINT EVIDENCE.**

On April 7, 2010 the defense again alleged prejudice for the *late* disclosure of the La Sportiva shoe evidence. The defense presented the same argument at hearing on March 2, 2010. The defense team claims prejudice is evident because they have no time to make any necessary adjustments and preclusion of the evidence is the only appropriate sanction.

Under Rule 15.7 and the law in Arizona, the State has not been *late* in any disclosure to the defense. The defense team has repeated the allegation of late disclosure so often in this case, they have somehow persuaded this court that sanctions are now appropriate.

Rule 15.7(b) states the final deadline for disclosure "Unless otherwise permitted ... shall be completed at least seven days prior to trial." The Court has not entered any other final deadline for disclosure. This Court has set earlier disclosure deadlines directed to evidence in the possession of the State <u>at that time.</u> The State complied fully with these orders.

The issue of the shoe impressions was not litigated until January 14, 2010. On January 27, 2010, less than two weeks later, the State discovered evidence that Defendant purchased a pair of La Sportivas which appear to match the impressions left behind Carol's house and next to the bicycle tire tracks. This information was disclosed on January 29, 2010. Defendant has failed to demonstrate how particularized prejudice on evidence received months before trial.

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

The defense alleges prejudice because the State withheld a report until January 2010 that was issued by Mr. Gilkerson on or about October 22, 2009. For the first time in this case Mr. Gilkerson indicated that some of the photographs sent for comparison months earlier "most closely correspond to a La Sportiva shoe." At that point in time the State had no evidence whatsoever linking the La Sportiva shoe to this case. It was not until the end of January that the State was able to link this type of shoe to the Defendant. This was four (4) months before trial!

> While the prosecution must disclose any information within the possession or control of law enforcement personnel, *Imbler v. Craven,* 298 F.Supp. 795 (C.D.Cal.1969), *aff'd sub nom. Imbler v. California,* 424 F.2d 631 (9th Cir.), *cert. denied,* 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104 (1970), it has no duty to volunteer information that it does not possess or of which it is unaware, *United States v. Goldberg,* 582 F.2d at 490.

United States v. Chen, 754 F.2d 817, 824 (1984).

When the State received the Gilkerson report in October, 2009, there was no way to know whether it was favorable or unfavorable to the defense. More investigation needed to be done to determine the applicability of the Gilkerson report to the State's case. When it was discovered that the defendant had purchased a pair of La Sportiva shoes in 2006 all of the information relative to the shoe print evidence was immediately disclosed. All of this occurred months in advance of the trial. As there was no *Brady* violation, non-disclosure of material which, up to that point, had no evidentiary value whatsoever, is harmless at best.

B. THE STATE HAS NOT MADE LATE DISCLOSURES

The State has not been *late* in the disclosure of any evidence in its possession or under its control. The State has fully complied with disclosure under Rules 15. 1 and 15. 7. However, from the questions directed by the Court to the State at the hearing on April 7,

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

2010, it appears this Court has bought into the defenses characterization that *late* is different from what is contained in the Rules of Criminal Procedure.

The defendant has had notice of the State's evidence months before the trial. This includes all of the computer evidence, the cell tower evidence, the specified emails, phone records and identification of the State's experts. To punish the State under all of the circumstances of this case would be contrary the laws of disclosure and unduly harsh to the victims.

CONCLUSION

One must not forget this is a case where an innocent women in the prime of her life was bludgeoned to death. All of the significant circumstantial circumstances point to only one person, the defendant. There must be compelling evidence before this court proving the State willfully failed to comply with the rules of disclosure. There is no such evidence.

If the court is persuaded to rule in favor of the defendant's, no jury will be able to hear the truth on what happened on July 2, 2008. The remedy of preclusion of the evidence is not warranted with the facts before this court.

///

///

///

///

///

///

///

///

RESPECTFULLY SUBMITTED this 8th, April, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this 8th day of April, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

John Sears
511 E.. Gurley St.
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

By: Deb Connell

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110